STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

IN THE MATTER OF:	)	
	)	
CATHERINE STEPHENSON,	)	
	)	
	)	
Complainant,	)	CHARGE NO(S): 2005CA1879
	)	EEOC NO(S): N/A
and	)	ALS NO(S): 06-442
	)	
CHICAGO TRANSIT AUTHORITY,	)	
	)	
Respondent.	)	

NOTICE

You are hereby notified that the Illinois Human Rights Commission has not received timely exceptions to the Recommended Order and Decision in the above named case. Accordingly, pursuant to Section 8A-103(A) and/or 8b-103(A) of the Illinois Human Rights Act and Section 5300.910 of the Commission's Procedural Rules, that Recommended Order and Decision has now become the Order and Decision of the Commission.

STATE OF ILLINOIS)
HUMAN RIGHTS COMMISSION) Entered this 23rd day of August 2010

N. KEITH CHAMBERS
EXECUTIVE DIRECTOR

STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

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	)	**Charge No.: 2005CA1879**
and	)	**EEOC No.: N/A**
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CHICAGO TRANSIT AUTHORITY,	)	
	)	**Judge Lester G. Bovia, Jr.**
Respondent.	)	

RECOMMENDED ORDER AND DECISION

This matter has come to be heard on Respondent's Motion for Summary Decision ("Motion"). Complainant has filed a response to the Motion, and Respondent has filed a reply. Accordingly, this matter is now ready for disposition.

The Illinois Department of Human Rights ("Department") is an additional statutory agency that has issued state actions in this matter. Therefore, the Department is an additional party of record.

FINDINGS OF FACT

The following facts were derived from uncontested sections of the pleadings, affidavits, and other documents submitted by the parties. The findings did not require, and were not the result of, credibility determinations. Moreover, all evidence was viewed in the light most favorable to Complainant. Facts not discussed herein were deemed immaterial.

1. Complainant's gender is female.

2. Complainant was 59 years of age during the relevant time period.

3. Complainant was employed by Respondent as a rapid transit operator ("RTO").

4. During the evening of May 19, 2004, Complainant was assigned to operate a Blue Line train. At the beginning of Complainant's shift that night, she was advised that there was a

single-track zone on her route near the Kedzie Avenue station. A single-track zone is a section of track where trains operate over one track in both directions because a section of track has been put out of service. The point at which two tracks become one is known as a "crossover."

5. Complainant's train approached the Kedzie crossover at approximately 9:00 p.m. However, Complainant was not to proceed through the crossover until she received a signal from the switchman indicating that he had properly set the track's switches to allow train traffic. A signal to an RTO indicating that a train may proceed is known as a "highball."

6. Complainant never received a highball from the switchman, but proceeded through the crossover anyway. Thus, Complainant caused a "split switch," which occurs when the wheels of the train force the switch over from one track to another causing damage to the switch mechanism. Respondent suspended service on the Blue Line for approximately 15-20 minutes while the switch was being repaired.

7. For eight days, Complainant insisted in various communications with management that she had received a highball from the switchman to proceed through the crossover. Complainant finally admitted on May 28, 2004 that she, in fact, never received a highball.

8. On June 23, 2004, Respondent discharged Complainant due to her involvement in the split-switch incident, her false reports about the incident, and her previous safety violations.

9. Complainant filed a grievance against Respondent to contest her discharge. By order dated July 29, 2005, the arbitrator reduced Complainant's discipline to a time-served suspension without back pay and reinstated her employment.

10. On November 3, 2004, Complainant filed a charge with the Department alleging that Respondent discharged her due to her age and sex. Respondent denies Complainant's allegations.

CONCLUSIONS OF LAW

1. Complainant is an "aggrieved party" and Respondent is an "employer" as those terms are defined in the Illinois Human Rights Act ("Act"), 775 ILCS 5/1-103(B) and 5/2-101(B).

2. Complainant cannot establish a *prima facie* case of age discrimination.

3. Complainant cannot establish a *prima facie* case of sex discrimination.

4. Respondent has articulated legitimate, nondiscriminatory reasons for discharging Complainant, and Complainant cannot establish that Respondent's proffered reasons are pretextual.

5. There is no genuine issue of material fact regarding Complainant's claims, and Respondent is entitled to a recommended order in its favor as a matter of law.

DISCUSSION

I. SUMMARY DECISION STANDARD

Under section 8-106.1 of the Act, either party to a complaint may move for summary decision. 775 ILCS 5/8-106.1. A summary decision is analogous to a summary judgment in the Circuit Courts. Cano v. Village of Dolton, 250 Ill. App. 3d 130, 138, 620 N.E.2d 1200, 1206 (1st Dist. 1993).

A motion for summary decision should be granted when there is no genuine issue of material fact and the moving party is entitled to a recommended order in its favor as a matter of law. Fitzpatrick v. Human Rights Comm'n, 267 Ill. App. 3d 386, 391, 642 N.E.2d 486, 490 (4th Dist. 1994). All pleadings, affidavits, interrogatories, and admissions must be strictly construed against the movant and liberally construed in favor of the non-moving party. Kolakowski v. Voris, 76 Ill. App. 3d 453, 456-57, 395 N.E.2d 6, 9 (1st Dist. 1979). Although not required to prove her case as if at a hearing, the non-moving party must provide *some* factual basis for denying the motion. Birck v. City of Quincy, 241 Ill. App. 3d 119, 121, 608 N.E.2d 920, 922 (4th Dist. 1993). Only facts supported by evidence, and not mere conclusions of law, should be considered. Chevrie v. Gruesen, 208 Ill. App. 3d 881, 883-84, 567 N.E.2d 629, 630-31 (2d Dist. 1991). Inasmuch as summary decision is a drastic means for resolving litigation, the movant's right to a summary decision must be free from doubt. Purtill v. Hess, 111 Ill.2d 229, 240 (1986).

II. COMPLAINANT CANNOT ESTABLISH A *PRIMA FACIE* CASE OF AGE OR SEX DISCRIMINATION

There are two methods for proving employment discrimination under the Act, direct and indirect. Sola v. Human Rights Comm'n, 316 Ill. App. 3d 528, 536, 736 N.E.2d 1150, 1157 (1st Dist. 2000). Because there is no direct evidence of employment discrimination in this case (*e.g.*, a statement by Respondent that it discharged Complainant because of her age or sex), the indirect analysis is appropriate here.

The analysis for proving a charge of employment discrimination through indirect means was described in the U.S. Supreme Court case of McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and is well established. First, Complainant must make a *prima facie* showing of discrimination by Respondent. Texas Dep't. of Cmty. Affairs v. Burdine, 450 U.S. 248, 254-55 (1981). If she does, then Respondent must articulate a legitimate, nondiscriminatory reason for its actions. Id. If Respondent does so, then Complainant must prove by a preponderance of evidence that Respondent's articulated reason is merely a pretext for unlawful discrimination. Id. This analysis has been adopted by the Commission and approved by the Illinois Supreme Court. See Zaderaka v. Human Rights Comm'n, 131 Ill.2d 172, 178-79 (1989).

To establish a *prima facie* case of age discrimination, Complainant must prove: 1) she was at least 40 years of age at the time of the adverse job action; 2) she was meeting Respondent's legitimate performance expectations; 3) she suffered an adverse job action; and 4) similarly situated, younger employees were treated more favorably. Honaker and Rhopac Fabricators, Inc., IHRC, ALS No. 12089, July 10, 2006. Similarly, to establish a *prima facie* case of sex discrimination, Complainant must prove: 1) she is in a protected class; 2) she was meeting Respondent's legitimate performance expectations; 3) she suffered an adverse job action; and 4) similarly situated employees outside her protected class (*i.e.*, males) were treated more favorably. McQueary and Wal-Mart Stores, Inc., IHRC, ALS No. 9416, November 20,

1998. Because the elements for the two causes of action are substantially similar, they can be analyzed together.

The parties agree that Complainant, who was 59 years of age at all relevant times, is protected from unlawful age and sex discrimination. The parties also agree that Complainant's discharge constitutes an adverse job action. The parties disagree as to whether Complainant's work performance met Respondent's legitimate expectations at the time of her discharge which, of course, is the relevant time period. See Patten and MCI Telecomms. Corp., IHRC, ALS No. 8257, May 19, 1997. The parties also disagree as to whether similarly situated employees outside Complainant's protected classes were treated more favorably. As discussed below, Complainant cannot establish a *prima facie* case of age or sex discrimination as a matter of law because she cannot satisfy element two or four for either cause of action.

A. Complainant Cannot Establish That Her Work Performance Met Respondent's Legitimate Expectations

On the issue of Complainant's job performance, Respondent asserts that the facts surrounding the May 19, 2004 incident, and Complainant's prior safety violations, prove that Complainant was a poor performer.

During the evening of May 19, 2004, Complainant was assigned to operate a Blue Line train. (March 23, 2005 Transcript of Complainant's Arbitration Proceedings at 88, Respondent's Motion at Ex. B.) At the beginning of Complainant's shift that night, she received a bulletin advising her that there was a single-track zone on her route near the Kedzie Avenue station. (Id. at 89.) A single-track zone is a section of track where trains operate over one track in both directions (*e.g.*, northbound and southbound or eastbound and westbound) because a section of track has been put out of service for repairs. (CTA Standard Operating Procedure for Single-Track Zones, Respondent's Motion at Ex. C.) The purpose of a single-track operation is to maintain service and keep delays to a minimum even though one track is out of service. (Id.)

The point at which two tracks become one is referred to as a "crossover." (See, e.g., March 23, 2005 Transcript of Complainant's Arbitration Proceedings at 14.)

The crewmembers assigned to the Kedzie crossover on May 19, 2004, and their respective duties, were as follows:

> The switchmen, Charlie Peacock and Romel Miller, were responsible for crossing trains over to the single-track zone.
>
> The flagman, Michelle Baldwin, was responsible for guiding trains to the crossover.
>
> The pilot, Demetrius Moss, was responsible for navigating all movements through the single-track zone and confirming that the RTO's had the proper signals to proceed through the crossover.
>
> The rail supervisor, Edward Lomax, was to board the trains before the crossover and ensure that all crewmembers performed their duties as expected.

(Id. at 28-31; CTA Standard Operating Procedure for Single-Track Zones.)

At approximately 9:00 p.m., as Complainant's train approached the Kedzie crossover, Ms. Baldwin gave Complainant a "highball" signal by flashlight, indicating that all was clear and that Complainant could proceed safely to the crossover. (March 23, 2005 Transcript of Complainant's Arbitration Proceedings at 93.) When Complainant arrived at the crossover, she stopped her train to allow Mr. Moss and Mr. Lomax to board. (Id. at 93-94.) However, Complainant was not to proceed any further until she received a second highball, this time from a switchman, indicating that the crossover switches had been properly set to allow train traffic to proceed safely through the crossover. (Id. at 102.)

Neither of the switchmen gave Complainant a highball. (Id. at 97.) However, for some unexplained reason, Complainant began to travel through the crossover anyway. (Id.) At the time Complainant's train started moving, the switchmen had not yet set the switches to allow traffic. (Arbitrator's Order from Complainant's Grievance at 5-6, Complainant's Response Brief

at Ex. 3.) Thus, Complainant's train caused a "split switch," which occurs when the wheels of the train force the switch over from one track to another causing damage to the switch mechanism. (Id.) Respondent was forced to suspend service on the Blue Line for approximately 15-20 minutes while the switch was being repaired. (March 18, 2005 Transcript of C. Peacock's Arbitration Proceedings at 272, Respondent's Motion at Ex. K.) Respondent suspended the entire crew pending an investigation. (Final Investigation Report dated May 28, 2004 at 2-5, Respondent's Motion at Ex. F.) Respondent ultimately concluded that all crewmembers were culpable for the incident. (Id.)

On the night of May 19, 2004 and for eight days afterward, Complainant discussed the incident numerous times with Respondent's management personnel through interviews and written reports. (March 23, 2005 Transcript of Complainant's Arbitration Proceedings at 15-20.) Every time, Complainant insisted that she had received a highball from Mr. Peacock to proceed through the crossover. (Id. at 15-20, 54-63.) At night or other times of reduced visibility, a highball can be given only by flashlight. (Id. at 77.) At some point after the incident, however, Complainant learned that Mr. Peacock did not even have a flashlight that night. (Id. at 104.) Mr. Peacock had loaned his flashlight to Ms. Baldwin, who did not bring her own flashlight to work. (March 18, 2005 Transcript of C. Peacock's Arbitration Proceedings at 245-47.)

On May 28, 2004, Complainant finally admitted for the first time that she, in fact, never received a highball from either of the switchmen. (March 23, 2005 Transcript of Complainant's Arbitration Proceedings at 20, 106.) Complainant has acknowledged that her previous statements about having received a highball from Mr. Peacock were false. (Id. at 107.) Complainant claims that she changed her story because she "wanted to put the truth in [her] report." (Id.)

On June 23, 2004, Respondent discharged Complainant. (Id. at 111.) Respondent asserts that Complainant's discharge was due to her involvement in the split-switch incident, her

false reports about the incident, and two previous safety violations that she committed in August and October 2003. (Id. at 22-24.)

In sum, Respondent has proffered sworn testimony and other evidence proving that, as of the time of Complainant's discharge, Complainant had: 1) admitted her involvement in the split-switch incident; 2) lied about the incident to management; and 3) committed two prior safety violations. In response, but without supplying any evidence whatsoever in support, Complainant asserts in her brief that she "was performing her duties prior to the incident of May 19, 2004" and that "[s]he was not on probation." (Complainant's Response Brief at 12.)

When a respondent supplies sworn facts that, if uncontroverted, warrant judgment in its favor as a matter of law, a complainant may not rest on her pleadings to create a genuine issue of material fact. Fitzpatrick, 267 Ill. App. 3d at 392, 642 N.E.2d at 490. Uncontroverted sworn facts must be accepted as true. Rotzoll v. Overhead Door Corp., 289 Ill. App. 3d 410, 418, 681 N.E.2d 156, 161 (4th Dist. 1997). Thus, a complainant's failure to file counter-affidavits in response is frequently fatal to her case. Id. In this case, Complainant has not rebutted Respondent's proffered testimony which, therefore, must be accepted as true. Accordingly, Complainant cannot establish that her job performance was meeting Respondent's legitimate expectations at the time of her discharge.

B. Complainant Cannot Establish That Similarly Situated, Younger and/or Male Employees Received More Favorable Treatment

In an effort to prove element four, Complainant proffers her fellow crewmembers who were involved in the split-switch incident. While the entire crew was found to have committed assorted safety violations related to the incident, Complainant claims that she was disciplined more harshly than crewmembers outside her protected classes.

In addition to being suspended pending the investigation, the other crewmembers were disciplined as follows:

1) Mr. Peacock, who was 38 years of age, was discharged pursuant to an August 2003 settlement agreement he entered into with Respondent to settle a prior grievance relating to previous safety violations. (Arbitrator's Order from Mr. Peacock's Grievance at 11, Respondent's Motion at Ex. L.) The agreement provided that Mr. Peacock would be discharged if he committed any safety violations within one year of the agreement. (Id.) An arbitrator ultimately reinstated Mr. Peacock, however. (Id. at 19.)

2) Mr. Miller, who was 26 years of age, received a corrective case interview, a final written warning, and retraining. (Id. at 6.)

3) Mr. Moss, who was 26 years of age, received a corrective case interview, a final written warning, and retraining. (Id.)

4) Mr. Lomax, who was 36 years of age, received a 15-day suspension and retraining. (Id.)

5) Ms. Baldwin, who was 39 years of age, received a written warning and retraining. (Id.)

Complainant's situation is easily distinguishable from those of the other crewmembers. First, Complainant was the only person involved who materially, repeatedly, and admittedly lied about the incident. Second, unlike most of her fellow crewmembers, Complainant had committed prior safety violations. The only other crewmember alleged to have had a history of safety violations was Mr. Peacock, whom Respondent also discharged.

Indeed, Mr. Peacock's situation is truly problematic for Complainant's case. In sum, Mr. Peacock: 1) was involved in the split-switch incident, just like Complainant; 2) had a prior history of safety violations, just like Complainant; 3) was discharged by Respondent, just like Complainant; and 4) was outside both of Complainant's protected classes (*i.e.*, he was under 40 years old and male). The fact that Respondent discharged Mr. Peacock under these circumstances completely undercuts Complainant's position that Respondent treated younger and/or male crewmembers more favorably.

Therefore, Complainant cannot prove, as she must, that Respondent treated similarly situated, younger and/or male employees more favorably.

III. RESPONDENT HAS ARTICULATED LEGITIMATE, NONDISCRIMINATORY REASONS FOR DISCHARGING COMPLAINANT, WHICH COMPLAINANT CANNOT ESTABLISH ARE PRETEXTUAL

Even if Complainant could prove a *prima facie* case of age or sex discrimination, that would not be the end of the inquiry because Respondent has articulated legitimate, nondiscriminatory reasons for discharging her. As discussed above, Respondent asserts that it discharged Complainant because of her involvement in the split-switch incident, her false reports about the incident, and her previous safety violations in August and October 2003.

It is worth noting that Complainant filed a grievance to contest her discharge. After a hearing, the arbitrator found that Complainant committed numerous safety violations in connection with the split-switch incident and lied about the incident. (Arbitrator's Order from Complainant's Grievance at 24-26.) However, the arbitrator reduced Complainant's discipline to a time-served suspension without back pay and reinstated her because he concluded that discharge was too severe a penalty given the collective culpability of the crewmembers. (Id. at 25-27.)

Nevertheless, Respondent believed in good faith that it had just cause to discharge Complainant at the time that it acted. The fact that an arbitrator subsequently disagreed does not affect the legitimacy of Respondent's reasons for acting. See Green and Chicago Transit Auth., IHRC, ALS No. 2907, July 26, 1991 (holding employer's good-faith belief that discipline was warranted qualified as legitimate and nondiscriminatory, even if that belief later turned out to be false). In short, Respondent's reasons for discharging Complainant were legitimate and nondiscriminatory.

The issue, then, is whether Complainant can prove that Respondent's proffered reasons are pretextual. To prove pretext, Complainant must show: 1) the proffered reasons have no basis in fact; 2) the proffered reasons did not actually motivate the decision; or 3) the proffered

reasons are insufficient to motivate the decision. Grohs v. Gold Bond Bldg. Prods., 859 F.2d 1283, 1286 (7th Cir. 1988). In short, a pretext is a lie. Hobbs v. City of Chicago, 573 F.3d 454, 461 (7th Cir. 2009).

Complainant argues that deciding whether to believe Respondent's proffered reasons is a credibility determination properly made after a public hearing, not on summary decision. The issue, however, is not whether Respondent's reasons are believable. Rather, the issue is whether Respondent articulates a reason at all. The law is clear: Respondent need only articulate, *not prove*, a legitimate, nondiscriminatory reason for discharging Complainant to force Complainant to establish pretext. Bennett and Cappuccilli, IHRC, ALS No. 12288, August 31, 2005.

Complainant scoffs at Respondent's proffered reasons for discharging her, arguing that they were pretexts fabricated merely "to get rid of this female senior citizen." (Complainant's Brief at 9.) However, Complainant has offered no evidence whatsoever to support this argument. Thus, even if Complainant could establish *prima facie* cases of age and sex discrimination, her claims would still fail.

RECOMMENDATION

Based on the foregoing, there is no genuine issue of material fact regarding Complainant's claims of age and sex discrimination, and Respondent is entitled to a recommended order in its favor as a matter of law. Accordingly, it is recommended that: 1) Respondent's Motion be granted; and 2) the complaint and underlying charge be dismissed in their entirety with prejudice.

HUMAN RIGHTS COMMISSION

BY: _____

LESTER G. BOVIA, JR.
ADMINISTRATIVE LAW JUDGE
ADMINISTRATIVE LAW SECTION

ENTERED: December 17, 2009